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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 210

W. E. WHITMORE,

Appellant,

vs.

R. L. ORMSBEE, COMMISSIONER OF THE BUREAU OF REVENUE, STATE OF NEW MEXICO

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

C. C. McCULLOH,
Attorney General of New Mexico;
THOS. C. McCARTY,
Assistant Attorney General of New Mexico,
Arthur W. Scharfeld
Counsel for Appellee.

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R. L. ORMSBEE, COMMISSIONER OF THE BUREAU OF REVENUE, STATE OF NEW MEXICO

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

(APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM)

APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this his statement in opposition to Appellants' statement as to jurisdiction. Appellee includes herein his motion to dismiss the appeal, or in the alternative to affirm the judgment of the District Court on

the ground that the questions raised on behalf of Appellants are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, Appellee asserts that the unsubstantial character of the grounds stated by Appellants is so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of the proceeding.

The records on file in this action show that the District Court, sitting as a Three Judge Court, reviewed and made its decision and judgment after a full hearing in which each of the parties were given an opportunity to present evidence, Trial Briefs, and argue the evidence and law pertaining thereto.

The matters here relied upon by Appellee are more particularly stated below:

Summary

The Appellant herein, by its appeal, presents two issues, out of the six Assignments of Error, which Appellee deems decisive on the question of jurisdiction of the District Court:

1. The Act of 1935, Sec. 76-1416 of the New Mexico Statutes Annotated, 1941 Compilation, requiring the obtaining of a single license tax or fee of $1.00 for registration. It being contended by Appellant that this provision is unconstitutional by reason of Art. I, Sec. 8, Clause 3, United States Constitution, and

2. That the "Johnson Act", 48 Stat. 775, as amended, 50 Stat. 738, Sec. 24 (1) of the Judicial Code, 28 U. S. C. A., Sec. 41 (1), which provides that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed or pursuant to the laws of any

State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State," is applicable to the present case.

The above issues were decided in favor of Appellee in the comprehensive, clear and concise opinion of the District Court, and it appears Appellee can add but little, if anything, thereto.

Appellee's Statement of the Case and Facts

The Statement of the Case and Facts being so clearly and concisely stated in the "Opinion of the Court" and "Findings of Fact," a copy of same being attached hereto as Appendixes "A" and "B,"[1] Appellee deems it would be superfluous to encumber the record by any additional Statement of Case or Facts.

Propositions and Authorities

I

District Court Did Not Err in Holding License, Tax, or Registration Fee Not Direct and Substantial Burden on Interstate Commerce.

Section 76-1416 of the N. M. 1941 Compilation provides, in part, as follows:

> "No person shall engage or continue in any business within this state, subject to taxation under this act, unless he shall file with the Tax Commission (Bureau of Revenue) an application for a license. • • • Provided that a person who has heretofore registered under Chapter 7 of the Laws of the Special Session of 1934 and whose license has not been revoked shall

[1] (CLERK'S NOTE—These documents are printed as an Appendix to the Statement as to Jurisdiction in No. 210 and are not reprinted here.)

not be required to *register or to pay an additional fee* under the terms of this section." (Emphasis ours.)

It is noted, by reading the entire section, that the purpose of this provision is for the Bureau of Revenue to obtain information concerning the name of the particular business, kind of business transacted, the location of the place of business, and various other miscellaneous information which must necessarily be obtained by the Bureau of Revenue for their records. The last sentence of this act uses the word "register," showing that while the section refers to a license, it actually means merely that registration is required for the purpose of administering the act. Nowhere does the Appellant complain as to the amount of the registration fee as being in excess of what the expense would actually be in registering the information desired.

The Appellant selected the State of New Mexico in which to locate its broadcasting station, and indirectly admits that it is an intrastate business, but that such business should be considered interstate. If Appellant should be permitted to do intrastate business without registering, which is mandatory on practically all businesses in the State of New Mexico, then it could be more justly said that other businesses were being discriminated against by not compelling the Appellant to likewise register and pay the $1.00 fee.

Regardless of whether this statute is construed to require a license in the strict sense of the word, or is construed as merely requiring registration, it is obviously constitutional. (See the recent decision of the Supreme Court of the United States in the case of *Union Brokerage Company* v. *Jensen, et al.*, 322 U. S. 202, 64 S. Ct. 967 88 L. Ed. ——, 152 A. L. R. 1072. Also see *Postal Telegraph Cable Company* v. *Mayor, etc., of Baltimore*, 156

U. S. 210, 15 S. Ct. 356, 39 L. Ed. 399. Also see *Pacific Telephone & Telegraph Co.* v. *Tax Commission of Wash.*, 297 U. S. Reports, Page 403, and 301 U. S. Reports, Page 183.)

It should be noted that inasmuch as Appellant's physical activities are entirely confined to the State of New Mexico, no other State could require a license or registration fee from Appellant.

II

Appellant Has Plain, Speedy and Efficient Remedy at Law or in Equity in the Courts of New Mexico

The District Court, in its opinion, beginning at Page 4 of the copy filed herewith as Appendix "A,"[2] sets forth the remedy at law provided by "The Act of 1935, supra", and in the following paragraph, same page sets forth the alternative remedy of the taxpayer by equitable relief provided by the Constitution of the State of New Mexico, Article 6, Section 13, and the case of *Lougee* v. *New Mexico Bureau of Revenue Commission*, 42 N. M. 115, 76 P. 2d 6, which clearly establishes that a plain, speedy and efficient remedy at law or in equity in the Courts of New Mexico is and has been available to Appellant.

In the recent case of *Hillsborough Tp.* v. *Cromwell*, 66 S. Ct. 445, decided January 28, 1946, at Page 448 the Court said:

> "Sec. 267 of the Judicial Code, 28 U. S. C. § 384, 28 U. S. C. A. § 384, provides that suits in equity shall not be sustained in the federal courts 'in any case where a plain, adequate, and complete remedy may be had at law.' That principle has long been recognized as having 'peculiar force' in cases where the federal courts were asked to enjoin the collection of a state tax. Matthews *v.* Rodgers, 284 U. S. 521, 525,

[2] (Not reproduced here.)

52 S. Ct. 217, 219, 76 L. Ed. 447, and cases cited. 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Id., 284 U. S. page 525, 52 S. Ct. page 219. Where the remedy at law is 'plain, adequate, and complete,' it is the one which must be pursued even for the protection of any federal right. That practice of the federal equity courts was given further recognition and sanction by Congress in the Johnson Act, 48 Stat. 775, as amended, 50 Stat. 738, § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1), 28 U. S. C. A. § 41 (1), which provides that 'no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' * * *"

WHEREFORE, Appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, affirm the decree of the District Court.

Respectfully submitted,

C. C. MCCULLOH,
Attorney General,
Santa Fe, New Mexico;
THOS. C. MCCARTY,
Assistant Attorney General,
Santa Fe, New Mexico,
Counsel for Appellee.

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